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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1968.

No. .

PERCELL TARBORO,
Petitioner,

v.

READING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Percell Tarboro, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on June 19, 1968. A petition for rehearing was timely filed and was denied on August 19, 1968.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, page 13) is set forth at — Fed. 2d —. No opinion was filed by the Trial Court.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 19, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254(1).

QUESTIONS PRESENTED.

When the Petitioner, a Payroll Employee of a Subcontractor of the Railroad, Works at a Small Segment of an Overall Operation Otherwise Staffed by Railroad Employees on the Railroad Premises, and All the Tools, Machinery and the Premises Themselves Are Under the Explicit Control of the Railroad, and the Subcontractor Was Paid on a Cost Plus Basis With Access by the Railroad to the Subcontractor's Books, Was It Not in Error for the Court to Refuse to Submit the Issue as to Whether Petitioner Was an Employee of the Railroad Under the Federal Employers Liability Act, to the Jury.

STATEMENT OF THE CASE.

This is a civil action arising out of a complaint filed by the appellant herein on August 8, 1962, against the Reading Company and E. W. Coslett & Sons, Inc. Trial was had on this cause of action on November 14, 1966. Upon completion of the plaintiff-petitioner's case, motions for directed verdict were filed by both Reading Company and E. W. Coslett & Sons, Inc. The motions were granted and a verdict directed by the Court was entered on November 17, 1966.

The cause of action arises out of the traumatic amputation of fingers and the crushing of plaintiff's right hand at about 11:20 a.m. on July 2, 1962. At the time, plaintiff was a payroll employee of E. W. Coslett & Sons, Inc., but was performing a high risk segment of the integral operation of moving railroad hopper cars on Pier 11 to a point where the coal would be emptied on a conveyor belt leading to the ultimate loading of barges. The operation involved the use of car riders, checkers, and maintenance men in addition to the type of work being done by the plaintiff. The car riders, checkers and maintenance men were payroll employees of Reading Company (115a). Pier 11 was part of the Port Richmond complex of piers owned and operated by Reading Company. Pier 11 took the overflow of the coal discharge operations of pier 18 (128a).

On Pier 11, the hopper railroad cars containing the coal would be brought up an incline of trackage by a locomotive car (123a). Riders would then board the car and ride it down to the discharge point which was directly over a moving conveyor (123a). The cars would then be braked by the car riders at this point and chocks would be placed under the wheels at the same time by the so-called Coslett employees (123a). At this point, the Coslett employees would

get under the car to open the hatches so the coal would fall through on to the conveyor below (123a). A shaker had been installed by the Reading Company (146a) which was then operated by a Coslett employee to shake the railroad cars (129a) by placing arms on the railroad cars and vibrating the cars. At the same time a Coslett employee was required to get into the car with a broom and shovel to expedite the removal of the coal through the open hatch (45a). There were no footholds and the employee was required to brace his feet against the sides of the coal compartment just above the yawning open hatch (70a). Plaintiff's foot slipped and in order to save himself from falling into the open hatch and the conveyor, he desperately and instinctively grabbed for the side of the railroad car (89a, 90a). At that precise moment, the shaker arms smashed down on his hand, traumatically amputating parts of his fingers and crushing the rest of his hand.

The shaker had been designed to operate two cars simultaneously from a cab with limited visibility in that it had two windows and the controls for both cars in between the windows (38a). The operator of the shaker could not see the men in the car (45a). The shaker was intended to be placed in the center of the car so that it would not be near the men working in the compartments of the car (44a). However, it had a tendency to creep (47a, 71a), and it was this creeping that resulted in its being at the end of the car where the plaintiff had been working at the precise moment that he thrust his hand up to save himself. It is a fair inference that the excessive vibration in the end of the car in which the plaintiff was working was a contributing factor to his loss of footing which started the unfortunate train of events. Plaintiff's fingers were in threads (91a). He managed to climb out of the car and then fainted (91a).

Inasmuch as the issues herein are the withdrawal of plaintiff's case from the jury, it would serve no purpose to elucidate further on plaintiff's substantial and disabling injuries.

The work being performed by payroll employees of Coslett at Pier 11 and Pier 18, the coal piers, arises out of a contract entered into in 1943 (120a). At Pier 11 all tools and instrumentalities were the property of Reading Company from the simplest bar and shovel to the expensive shaker (125a, 146a).

Appeal was timely taken to the Court of Appeals for the Third Circuit, the Judgment of the Court below granting the directed verdict was affirmed on June 19, 1968. A Petition for Rehearing was timely filed and denied on August 19, 1968.

The Court of Appeals, in confirming the Court below, came to the conclusion that the instant case was governed foresquare by *Del Vecchio v. Pennsylvania R. Co.*, 233 F. 2d 2 (C. A. 3, 1956), *cert. den.*, 352 U. S. 909.

ARGUMENT.

I. The Trial Court Erred in Directing a Verdict for the Defendant Reading Company as to Employment Status When Appellant While Not Technically a Payroll Employee Was Injured Doing Railroad Work on Railroad Property, Using Railroad Tools and Equipment and Under the Implicit Control of the Railroad.

The opinion of the Court of Appeals for the Third Circuit in the instant case is erroneously based on the decision of *Del Vecchio v. Pennsylvania R. Co.*, 233 F. 2d 2 (C. A. 3, 1956), *cert. den.*, 352 U. S. 909, where the factual picture is dramatically different than the one at bar. In the *Del Vecchio* case, *supra*, the entire operation was performed by Northern Contracting Company. They took the cars from the general trackage. The railroad would advise Northern that certain identified coal should be loaded on a named vessel, expected to be available at a certain time. Northern was advised what tracks the cars were on and furnished with identification marks and weights. Northern then took charge and moved the cars to a dumper where it loaded the coal into the designated vessel. The railroad never had anything to do with the manner in which Northern's results were accomplished. While Northern used Pennsylvania equipment, it was responsible for the maintenance and made repairs to it. They cleaned the premises and maintained fire protection and watchmen. The total dominion was such that the Court in its opinion stated as a caveat:

> "We are not concerned whether Northern was a common carrier in those operations as only the railroad is being sued in this action."

In the instant case, the facts are totally inapposite. The cars were taken from the general trackage by Reading car riders to the point of discharge at the conveyor belt. Only then would the Coslett payroll employees proceed to do the hazardous work of getting the coal out of the hopper cars into the convcyor belt that took the coal to the vessel standing by. Then the cars were ridden by Reading payroll employees back to the general trackage. All the equipment was owned by Reading Company and maintained by Reading Company. The watchmen and the fire protection was maintained by Reading Company. These criteria were all missing from the *Del Vecchio* case, and it is these elements which were the basis for the decision in *Del Vecchio.*

II. The Decision Below Is in Direct Conflict With That of the Sixth Circuit in *Cimorelli v. New York Central Railroad Co.*, 148 F. 2d 575 and *Pennsylvania Railroad Co. v. Roth*, 163 F. 2d 161, *cert. den.*, 68 S. Ct. 208.

It is submitted that the Court of Appeals for the Third Circuit should have drawn the analogy to *Cimorelli v. New York Cent. R. Co.*, 148 F. 2d 575 (C. A. 6, 1945), which was cited with approval by the Supreme Court of the United States in *Ward v. Atlantic Coast Line R. Co.*, 362 U. S. 396, 400, 4 L. Ed. 2d 820, 823 (1960).

In *Cimorelli v. New York Central R. Co., supra,* all the indications relied on by Judge Kalodner in his opinion in the instant case were present. The subcontractor paid the claimant. They had the right to hire and fire persons of claimant's class, and there was a foreman, employed by the subcontractor. In addition, in the *Cimorelli* case, *supra,* the equipment was furnished by the subcontractor. Nevertheless, the Court of Appeals for the 6th Circuit, after reciting the criteria now formalized in Restatement of Agency 2d § 220, stated:

> "The important test is the control over the details of the work reserved by the employer and to what extent the person doing the work is in fact independent in its performance." (577)

Applying these tests to the *Cimorelli* case, the court pressed further inquiry into the degree of independence of the subcontractor as to the work it was to perform. For instance, the court pointed out that no part of the premises had been surrendered to the subcontractor and the court went on to say:

> "*The whole project involved many interdependent details, the control of any one of which could not be surrendered without disorganization of the whole.* From the very nature of the work its performance could not be committed exclusively to the discretion of the Duffy Company." (Emphasis supplied, p. 578)

The court found further that the bootstrap-lifted independence of the contract was negatived not only by the factual situation, but also by some of the contract provisions, *i.e.*, the railroad's approval of costs and access to records of the subcontractor. The court pointed out that whether there was in fact any interference or exercise of control was in itself not material. So long as the existence of the right or authority to interfere or control appears, explicit or implicit, the subcontractor cannot be said to be independent. The court held that the employment of the subcontractor being general and called upon according to the demands of the business, where the work is to be done when, where and in the proportions as the needs of the railroad might justify, in reality, "left in the subcontractor no independence" (p. 578).

In *Pennsylvania R. Co. v. Roth,* 163 F. 2d 161 (C. A. 6, 1947), *cert. den.,* 68 S. Ct. 208, 332 U. S. 830 (1947), in a similar factual situation to that of the *Cimorelli* case, cited

supra, and the instant case, a directed verdict on the issue of employment status was affirmed.

In the instant case, the criteria, as was pointed out, is even more compelling than either *Cimorelli, supra,* or *Roth, supra.*

The plaintiff was performing a high risk essential segment of moving the coal from the railroad car to barges for ultimate delivery. The premises belonged to the railroad. The shaker belonged to the railroad. The shaker was built, designed and maintained by the railroad. The very hand tools used were purchased and owned by the railroad. The control by the railroad permeated the entire operation, such as the determination as to which pier would be used—Pier 18 where the work was done completely by payroll employees of the railroad or the overflow to Pier 11, which involved a serious risk of personal injuries and where the work was done entirely by payroll employees of the railroad, except the dangerous portion which was done by payroll employees of Coslett. The determination as to the extent of the dumping of the coal lay entirely with the railroad. The decision as to whether the coal was not moving fast enough and whether the car should be sent back to the "hot house" for thawing lay entirely with the railroad. Whereas in other operations the use of the railroad equipment would be paid for by Coslett, no fees were paid for the use of the equipment of the railroad in the operation at Pier 11. The Reading Company had the contractual right of verifying Coslett's charges by inspecting Coslett's books and records. The workmen received orders from both Coslett's foreman and the railroad checker.

Sinkler v. Missouri Pac. R. Co., 356 U. S. 326, 2 L. Ed. 2d 799, *reh. den.* 356 U. S. 978, 2 L. Ed. 2d 1152, we submit, is also dispositive of this issue. In that case, the Court

said in discussing the Federal Employers Liability Act that it was the conception of this litigation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of the injuries to those persons who are engaged in that enterprise and the common endeavor (356 U. S. 330, 2 L. Ed. 2d 803).

In sum, it is submitted that where only an isolated task was performed by the Coslett payroll employees in the overall operation and that task is completely subservient to the control of the overall operation, reasonable men could find that the appellant herein was an employee within the meaning of the Federal Employers Liability Act. The broad reach accorded to juries in cases arising under the Federal Employers Liability Act as set forth in *Lavender v. Kurn,* 327 U. S. 645, 90 L. Ed. 916 (1946), should not have been so frustrated.

CONCLUSION.

It is ironical that strong argument could have been made that under the doctrine of *Cimorelli v. New York Cent. R. Co.*[1] and *Pennsylvania R. Co. v. Roth,*[2] as promulgated by the Court of Appeals for the Sixth Circuit, the Petitioner herein may have been entitled to a directed verdict that he was an employee, for the purposes of the Federal Employers Liability Act, of the Defendant, Reading Company. Minimally, the factual circumstances were overwhelming that the issue of employment status should have been submitted to the jury. Instead, he is denied that access. There is a sharp conflict between the Court of Appeals for the Sixth Circuit and the Court of Appeals for the Third Circuit. On that basis alone, this Court could entertain petition for Certiorari. This petitioner also raises the question that Section 5 of the Federal Employers

1. 148 F. 2d 575 (C. A. 6, 1945).

2. 163 F. 2d 161 (C.A. 6, 1947) *cert. den.* 68 S. Ct. 208, 332 U. S. 830 (1947).

Liability Act, reading as it does, the legal intent of the railroad to avoid its responsibility by contract, is fundamentally a jury question.[3]

The opinions of the Court of Appeals for the Third Circuit in this case creates an artificial wall which would bar persons from redress under the Federal Employers Liability Act who are doing the business of the railroad, but who are technically not payroll employees of that railroad. It is difficult to conceive of a record which reflects as much implicit control as the instant case, yet the matter never reached a jury. Section five of the Federal Employers Liability Act [4] is no less applicable because the contract is between the victim's so-called employer and the railroad instead of the railroad and the victim. The decision of the Court below would afford the opportunity for evasion of responsibility of a railroad under the Federal Employers Liability Act.

Respectfully submitted,

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Attorneys for Petitioner.

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3. 45 U. S. C. A. 55.
4. 45 U. S. C. A. 55.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 16413.

PERCELL TARBORO,

Appellant

v.

READING COMPANY

AND

E. W. COSLETT & SONS, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued December 5, 1967.
Before KALODNER, GANEY and SEITZ, *Circuit Judges.*

OPINION OF THE COURT.

(Filed June 19, 1968.)

By KALODNER, *Circuit Judge*

The District Court entered Judgment in favor of the defendants after granting their motions for a directed ver-

dict[1] in the plaintiff's personal injury action under the Federal Employers' Liability Act[2] and this appeal followed.

Plaintiff, at the time of his injury on July 2, 1962, was employed as a coal shoveler by the defendant E. W. Coslett & Sons ("Coslett"), a freight handler and forwarder, then engaged in unloading coal hopper cars at a pier owned by the defendant Reading Company ("Reading"), pursuant to an existing contract.

Reading's motion was granted on the ground that "from the plaintiff's evidence the jury could not find that the plaintiff was at the time of his injury an employee of the defendant railroad within the meaning of the Federal Employers' Liability Act, or that the contract between the railroad and Coslett was void under Section 5 of that Act . . ." Coslett's motion was granted on the ground that "as the plaintiff has conceded, the jury could not find from the plaintiff's evidence that the defendant Coslett was at the time of the plaintiff's injury a common carrier by railroad within the meaning of the Federal Employers' Liability Act. . . ."

On this appeal plaintiff contends that (1) his evidence as to his employment by Reading was sufficient to present a jury question and that the District Court erred in holding to the contrary; and (2) plaintiff's evidence made out a *prima facie* case on the issue of negligence.

We do not reach the second contention in our disposition of this appeal.

At this juncture it must be noted that while plaintiff in his "Notice of Appeal" appealed from the Judgment in

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1. The motions were made pursuant to the provisions of Rule 50(a) of the Federal Rules of Civil Procedure at the close of the plaintiff's case.

2. 45 U. S. C. A. § 51 *et seq.*

favor of Coslett, he "conceded" below[3] that the jury could not find from his evidence that Coslett was a common carrier within the meaning of the Federal Employers' Liability Act. Moreover, plaintiff has not here adverted, either in his brief or oral argument, to the entry of Judgment in Coslett's favor. Under these circumstances it must be concluded that plaintiff has abandoned his appeal insofar as the Judgment in favor of Coslett is concerned, and accordingly it will be affirmed.

Consideration of the question as to whether the District Court erred in holding that plaintiff's evidence as to his "employment" by Reading was insufficient to require submission to a jury must be prefaced by this statement of the critical facts presented by the record:

Coslett, as earlier stated, is a freight handler and forwarder and Reading is one of its many customers. Coslett has had a coal contract with Reading since 1943 for "The unloading at Pier 11 of anthracite and bituminous coal and coke from railroad cars to vessels", and "The trimming of cargo coal and coke and bunker coal in such vessels loading at Piers 11 and 18 as may be designated by the Manager of the Port Richmond Terminal or his duly authorized representative". The contract provides that Coslett is required "to furnish all labor required for the performance of the work", and Reading is to provide Coslett "free of charge" with "the shovels, trimming boards and candles required" in performing its work, and that Coslett may also use other

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3. Excerpt from transcript of testimony at page 317:

"Mr. Adler [counsel for plaintiff]: Your Honor, if I may, your Honor has used the words 'assented to dismissal.' I agree that with the arguments of Mr. Drexel that the evidence as entered by the plaintiff is not sufficient to establish that Coslett is a railroad. I don't know that I agree—

"The Court: Well, if you agree to that, isn't that the end of your case?

"Mr. Adler: Yes, your Honor."

Reading equipment on payment of "use" charges. The contract designates Coslett as an "independent contractor". It requires Coslett "to indemnify, protect and save harmless" Reading with respect to damages to its property and freight and "injuries" to any person, including employees "of either party". It further provides that Coslett is to employ and pay all persons engaged in the performance of its work, and that such persons should be regarded as its employees, subject "to its exclusive authority, supervision, direction and control", and right to discharge, and that Reading should pay Coslett for its services on a tonnage basis at specified rates.

The evidence established that Reading and Coslett are separately owned and operated corporate entities; their only relationship is contractual with respect to services to be rendered by Coslett to Reading in the handling of coal cargo; and they have no interlocking directors or officers.

The routine of the work performed by Coslett at Pier 11 at the time plaintiff was injured may be described as follows:

Reading employees moved coal hopper cars which were to be unloaded by Coslett's crew to a discharge point on Reading's tracks which was directly over a moving conveyor. Coslett employees would then take over. They would first place chocks under the wheels of the cars and then open their hatches so that the coal would fall through to the conveyor below. The "arms" of an overhead positioned "shaker" owned by Reading, but operated by Coslett employees, would then be attached to the middle sides of the car to be unloaded by Coslett employees and the "shaker" would shake the car so that its vibrations would accelerate the coal discharge process. At the same time a Coslett employee would get into the car with a broom and shovel to expedite the discharging operation.

While plaintiff was shoveling coal from a car which was being unloaded, his foot slipped just as he was bracing both feet against the sides of the car. He grabbed one of its sides and at that moment an arm of the shaker smashed down on his hand amputating part of his fingers and crushing the rest of his hand. Plaintiff's witnesses testified that the arms of the shaker had a tendency to "creep" from their position in the center sides of a car due to the car's vibration while being shaken and that it was this creeping which resulted in plaintiff's injury.

Coslett's work was being performed at the time of the accident by a crew of twelve of its employees supervised by its foreman Thomas. Reading personnel decided what cars were to be unloaded and when they were to be unloaded, but the work of unloading was under the sole control and direction of Coslett's foreman Thomas. Thomas hired and fired the members of his crew, and their wages were paid by Coslett. Reading's employees never gave any of Coslett's men any directions as to the manner in which the work of unloading was to be done. The only Reading personnel on Pier 11 during the unloading work was its checker and the car riders who brought and placed the hopper cars in position under the shaker. The duty of the checker was to keep a record as to which cars were unloaded and the tonnage in each.

The sum of plaintiff's contention is that its evidence presented a jury question as to plaintiff's employment by Reading by reason of the circumstances that Reading owned the "shaker" and the hand tools (brooms and shovels) used in the unloading operation; Reading had and exercised control with respect to which cars were to be unloaded and the time of their unloading, and finally that the work of unloading the cars was "the work of Reading Company" and that since plaintiff was engaged in that work he "was an employee of Reading".

Settled applicable principles relevant to plaintiff's contention may be stated as follows:

The primary factor to be considered in determining whether a plaintiff was employed by the defendant is whether the latter had the power to direct, control and supervise the plaintiff in the performance of his work at the time he was injured. Relevant factors to be considered are: who selected and engaged the plaintiff to do the work; who paid his wages for performing it; who had the power to terminate his employment; who furnished the tools with which the work was performed and the place of work. Ward v. Atlantic Coast Line Railroad Co., 362 U. S. 396 (1960).

While each case "must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative", and the question of employment "contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law", the question may be taken from the jury "if reasonable men could not reach differing conclusions on the issue." Baker v. Texas & Pacific Railway Co., 359 U. S. 227, 228 (1959).

On review of the record we are of the opinion that the District Court did not err in granting a directed verdict in favor of Reading because "reasonable men could not reach differing conclusions on the issue" as to whether plaintiff was an employee of Reading under the evidence adduced by the plaintiff. As earlier stated, plaintiff's evidence established that Coslett is an independent contractor and that its relationship with Reading both under its contract and performance is that of an independent contractor; Coslett was in complete charge of its own operations at Pier 11; it hired and fired its employees as it chose; its employees were on Coslett's payroll; and they were under Coslett's exclusive control and direction in the performance of their work.

Plaintiff's evidence in the instant case is virtually four square with that presented in Del Vecchio v. Pennsylvania Railroad Company, 233 F. 2d 2 (3 Cir. 1956), cert. den. 352 U. S. 909, where we affirmed the District Court's granting of the defendant's motion for a directed verdict.

There, the plaintiff was the employee of a stevedore, Northern Contracting Company, an independent contractor, which under a written contract with the Pennsylvania Railroad Company, unloaded coal from the latter's railroad cars for transshipment into vessels docked at a pier; Northern used Pennsylvania equipment; Northern controlled the way it performed its work; it hired the plaintiff, paid him and directed him in the performance of his duties; and the railroad directed Northern which cars were to be unloaded and where to deliver their cargo.

In holding that Northern's status was that of an independent contractor and that the injured plaintiff there was its bona fide employee and not the employee of the railroad, we said at page 5:

> "The usual tests evidencing appellant's bona fide employment by Northern are all present. Northern selected him, hired him, paid him, could discharge him and directed and controlled his work. . . . The cooperation and assistance furnished by the railroad helped enormously in the successful accomplishment of Northern's task but it was Northern who controlled the way it performed its job".

Our holding in *Del Vecchio* is dispositive in the instant case.

For the reasons stated the Judgment of the District Court in favor of the defendants, entered November 17, 1966, will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 16413.

PERCELL TARBORO,
Appellant

v.

READING COMPANY AND
E. W. COSLETT & SONS, INC.

(D. C. CIVIL ACTION No. 31853.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: KALODNER, GANEY and SEITZ, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 17, 1966, be, and the same is hereby affirmed, with costs.

ATTEST:
THOMAS F. QUINN,
Clerk.

June 19, 1968.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 16413.

PERCELL TARBORO,

Appellant

v.

READING COMPANY AND
E. W. COSLETT & SONS, INC.

Present: KALODNER, GANEY and SEITZ, *Circuit Judges.*

Upon consideration of appellant's motion for leave to extend time to file petition for rehearing, and the consent of counsel for appellees Reading Company and E. W. Coslett & Sons, Inc., all in the above-entitled case,

It is ORDERED that appellant be and hereby is granted an extension in time to file petition for rehearing until August 5, 1968.

By THE COURT,

KALODNER,
Circuit Judge.

Dated: July 12, 1968.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 16413.

PERCELL TARBORO,
Appellant

v.

READING COMPANY AND
E. W. COSLETT & SONS, INC.

SUR PETITION FOR REHEARING.

Present: HASTIE, *Chief Judge,* KALODNER, GANEY, FREEDMAN, SEITZ and VAN DUSEN, *Circuit Judges.*

The petition for rehearing filed by Appellant, Percell Tarboro in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

KALODNER,
Circuit Judge.

Dated: August 19, 1968.

BRIEF IN OPPOSI-
TION TO PETITION
FOR A WRIT OF
CERTIORARI

SUPREME COURT. U. S.

DEC 18 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968.

No. 754.

PERCELL TARBORO,

Petitioner,

v.

READING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Third Circuit (Petitioner's Appendix A, Page 13) is reported at — Fed. 2d —. No Opinion was filed by the Trial Court.

JURISDICTION.

The Judgment of the Court of Appeals was entered on June 19, 1968. Jurisdiction of this Court is based under 62 Stat. 928, 28 U. S. C. A. 1254(1).

QUESTION PRESENTED.

Did not the Court properly consider that Appellant was an employee of an independent contractor, rather than a railroad employee, where the evidence disclosed not only that Appellant was hired by the contractor and subject to its exclusive control; but also that such contractor was in complete charge of the operation in which engaged; had the sole right to hire and fire personnel; to fix and pay the wages to its employees; and to designate the means and manner in which its operations were to be effected?

STATEMENT OF THE CASE.

On July 2, 1962, E. W. Coslett & Sons, Inc. was engaged in unloading a coal hopper car situate on Pier 11, Port Richmond, which pier was owned by Appellee, Reading Company. Coslett was and had been and is a freight handler and forwarder. Appellee Reading Company was one of its many customers for whom it rendered such services.[1] There was no interlocking directorate or officers as between Coslett and Reading (148a); the Coslett firm originally being a partnership composed of Edward W. Coslett, Jr., his father and brothers (115a). The unloading operation was and had been carried out pursuant to a certain Agreement between such parties executed in 1943 as amended by rate changes (120a). Under the terms of such Agreement compensation for services rendered by Coslett as contractor was to be calculated on the basis of tonnage handled (128a) with provision for additional compensation to the extent provided therein for overtime (129a).

Coslett's principal function at Pier 11 was the unloading of anthracite and bituminous coal and coke from railroad cars to vessels (116a, 121a). To carry out these functions on Pier 11, Coslett employed a pier foreman and twelve other men, "who actually perform the work of unloading the cars" (149a). In addition thereto Coslett employed a chief foreman who, together with one of the Coslett brothers, exercise supervisory control over operation on all piers (150a). The pier foreman has control over hiring and firing of personnel and otherwise directs the manner in which the cars are unloaded or are to be unloaded (150a). The employees are paid by check by Cos-

1. Other customers include Delnac Terminals, J. E. Breneman Company and some 50-100 truck lines which operate in the Philadelphia area (135a).

lett at its offices at Pier "A" subject to the provision of of the PMTA-ILA contract then in effect (151a). Reading Company had no right (1) to direct the manner in which the unloading was to be done (2) to designate the number of persons to be employed for a particular job or where to report for such work or (3) the right to pay such employees (151a).

At the time of the accident which is the subject of this suit, Coslett's foreman on Pier 11 was Eddie Thomas, variously referred to as "Longbody" (55a, 125a). His duties were "to direct our men, our employees, in the unloading of coal" (149a). The authority vested in "Longbody" at Pier 11 was clearly understood by other Coslett employees (56a); and there was no doubt whatever but that the Coslett foreman was in complete and exclusive control of the operation (80a, 84a). The operator of the shaker—a one man operation—was a Coslett employee of 34 years standing (53a). Other personnel who put chocks in place (under the railroad cars) jacked the cars, and shoveled coal from the sides of the cars were all "Coslett men", hired and paid by Coslett (78a). The Appellant himself was admittedly hired by Coslett as a coal shoveler (94a). He understood that his co-workers—about a dozen men—were also Coslett employees hired to do a similar job. Nobody other than "Longbody", gave him any instructions on the day of the accident, and it was "Longbody", who told him to work in the car on the south side (96a, 97a) where the accident later occurred. Coslett and Reading personnel used separate locker rooms and did not interchange the same (58a). The only Reading personnel on Pier 11 during the unloading process was a checker and car riders who placed the hopper cars in position under the shaker and then quit the same (72a, 73a). After the car riders placed the cars in position by braking, the Coslett

employees chock the wheels, preparatory to unloading (74a); and when the unloading is completed, the car is "jacked" by Coslett men to move the car to another location (65a, 74a). The duty of the checker is "to keep a record of which cars are unloaded and how much tonnage is in each one so that the barge will not be overloaded or underloaded" (155a). On scattered occasion, in the absence of the Pier foreman, the Reading checker designated the car to be brought down for unloading, or sends the car back to the hothouse when the coal is frozen (66a-68a).[2] Reading personnel arranged for the time, place and amount of cars to be unloaded (159a) but the manner or means of unloading was Coslett's area of responsibility (150a).

On the date of the accident, Appellant was ordered to shovel coal from a car on the south side of Pier 11. Prior to climbing into the car, he opened the chute beneath the car, then struck the side of the car with a mallet to loosen the coal (89a). When he climbed onto the car, the shaker was already attached to the car and was vibrating the car (97a). The shaker was said to be positioned 8-15 feet distant (101a, 111a) to the west of his position in the east end of the car (100a). Also working in the same car was another Coslett employee, Davis; Appellant working on the north side of the car; Davis on the south side (138a)—the car being positioned east and west. The shaker was being operated fore and aft in normal fashion along the length of the car (141a). As Appellant backed towards the chute at the center of the car, "the coal gave way, and when the coal gave way, I reached to the side of the car and that is when the shaker hit it" (89a). Appellant attributed the cause of the accident to the fact that his foot had slipped on the

2. Neither of these conditions prevailed, however, on the date of the accident. Witness Clark, a 34-year veteran Coslett employee, testified that he had never received any orders from Reading checkers, maintenance men, or car riders (60a).

coal on which he was walking (108a); and there was no attempt to show that the accident had resulted from any act of negligence on the part of Appellee.

At the conclusion of Petitioner's case, the trial court dismissed Plaintiff's Complaint because Petitioner's own evidence disclosed that he was not a railroad employee; and the Court of Appeals affirmed for the same reason.

ARGUMENT.

The Petitioner Has Failed to Set Forth Any Valid Basis for Award of Certiorari. The Court of Appeals Held That the Facts of the Case Brought It Within Its Decision in the Del Vecchio Case. There Is No Conflict as Among the Courts of Appeals; and the Court Properly Interpreted the Provisions of the Federal Employees Liability Act.

In the instant case the decision of the Court of Appeals was predicated upon the fact that the Petitioner was not engaged on Reading's business nor was subject to its control as to the manner in which the work was to be done. In such regard the Court properly applied the test of "right to control": *Okolinsky v. Philadelphia, Bethlehem and New England R. Co.,* 170 F. Supp. 801 (1959); *Byrne v. Pennsylvania Railroad Co.,* 262 F. 2d 906 (1959); *Chicago, Rock Island & Pacific Ry. Co. v. Bond, Admr. of Turner,* 240 U. S. 449 (1916). Nor is there anything anti-social or repugnant in the application of such test. For if Reading is to be chargeable in damages as for negligent acts, it must be able to exercise control over those persons whose acts might impose liability on it. Therefore where Reading employed Coslett as a freight forwarder, because of its proficiency in such field, it should not be chargeable with negligent acts on the part of Coslett employees.

In *Del Vecchio v. Pennsylvania Railroad Company,* 233 F. 2d (1956), an employee of a freight unloader, was injured while working on Railroad property, pursuant to a contract between his employer and the Railroad. There was close coordination between the Railroad and contractor, although there was no interlocking directorate. The

Railroad designated when vessels were to be loaded and advised as to tracks, identification marks, etc. The contractor used Railroad equipment in the performance of the job. On such state of facts, the contractor was held to be an independent contractor and the Court of Appeals affirmed a directed verdict in favor of the Railroad.

Arrangements between carriers and freight loaders or unloaders necessarily require close cooperation and coordination between the contracting parties, but there is an obvious distinction between authoritative direction and control on the one hand, and cooperation between the parties on the other hand: *Chicago, Rock Island & Pacific Ry. Co. v. Bond, supra; Byrne v. Pennsylvania Railroad Co., supra.*

When Congress adopted the Federal Employers Liability Act, 62 Stat. 928, 28 USC 1254, it used the word "employee" in its natural sense, intended to describe a relationship of employer-employee *Robinson v. Baltimore & Ohio Railroad Co.,* 237 U. S. 84 (1915). Although it was foreseen that employees of other employers would be engaged in the various operations of the Railroad, it was the intent of Congress that one who is employed by an independent contractor is not an "employee" of, or "employed" by a "common carrier by railroad" merely because the activity in which he is engaged at the time of his injury is such that it could be characterized as an integral part of the railroad's business: *Hetman v. Fruit Growers Express Co.,* 346 F. 2d 947 (1965).

The decided cases which have either followed or distinguished the rule in the *Bond* case (240 U. S. 449) have done so because the facts have either met or failed to meet the test of control, which is paramount in the determination of independent contractor vis-à-vis the employer-employee relationship. The ultimate result in each case depends

upon the application of the various tests[3] to the facts of the particular case. Thus there might well be different results reached in cases decided in the same circuit,[4] and the fact that the Court in *Cimorelli v. New York Cent. R. Co.*, 148 F. 2d 575 (1945) relied upon by Petitioner, reached a different result than the Court in *Del Vecchio v. Pennsylvania Railroad Co., supra,* does not indicate a conflict between the decisions of the Court of Appeals for the Third and Sixth Circuits; only the facts in each case were different.

Here there was no doubt whatever but that Coslett was an independent contractor. It was engaged in the business of a freight forwarder and handler and performed services for many customers apart from Reading. It employed its own foreman and other employees to carry on its functions. It had supervisory personnel to oversee its operations; its employees were paid by check at its offices; its foreman had the right to hire and fire and to direct the manner in which the cars were to be unloaded. The fact that Reading employed car riders to bring the cars into position, or checkers to keep record of cars to be unloaded, etc. was to facilitate the operation only, and did not constitute retention of control on its part; and was not inconsistent with close cooperation between the independent contractor and the railroad: *Dougall v. Spokane, Portland & Seattle Ry. Co.*, 207 F. 2d 843, 846, 847 (1953).

There was equally no doubt but that Petitioner was Coslett's employee. He was hired by Coslett's foreman

3. Such tests including manner of payment under contract, right to hire and fire, control of manner in which work is to be done, etc.

4. This is illustrated in *Stevenson v. Lake Terminal R. Co.*, 42 F. 2d 357 (6th Cir. 1930) which followed the *Bond* case and *Erie R. Co. v. Marque*, 23 F. 2d 664 (6th Cir. 1928) which distinguished the *Bond* case.

and worked under his direction and control; no Reading employee ever gave him orders. All Coslett employees who testified considered that the Coslett foreman was in charge of the unloading. The cars were "chocked" by Coslett's men; and "jacked" into motion by Coslett men. The operator of the shaker was a Coslett employee; the coal shovelers were Coslett employees. At the time of the accident no employee of Reading was in or about the cars and neither controlled nor attempted to control the unloading operation. The facts of the case therefore brought it squarely within the principles of the *Bond* case and *Del Vecchio v. Pennsylvania Railroad Company, supra* upon which the affirmance by the Third Circuit was based.

The facts in *Cimorelli v. New York Cent. R. Co.*, 148 F. 2d 575 (1945), upon which Petitioner relies, are readily distinguishable from the facts adduced herein. In Cimorelli, the Railroad selected the time and place for unloading; had to approve in advance every item of cost and necessity of purchase of equipment by the contractor; had to approve insurance coverage; required the contractor to perform work *to such extent as was required by its superintendent;* had to approve in advance salaries and wages to be paid contractor's employees; had to designate how many employees to be employed in the work. Under such circumstances, the Sixth Circuit properly held that there was no independent contractor relationship.

Pennsylvania R. Co. v. Roth, 163 F. 2d 161 (1947) is equally distinguishable from the facts in the present case. In Roth, the Railroad directed the movement of cars, furnished guards, and retained authority to change unloading or storing of freight following government complaints. In such a situation, the Railroad retained control of the operation and the contractor was not "independent". This was not Coslett's situation. In both *Cimorelli* and

Roth, the *Bond* case was distinguished, the Court in *Cimorelli* pointing out (143 F. 2d 575, 578) that in the *Bond* case "there was no immediate supervision of the details by which [the contractor] was to do the work . . ." This was otherwise in *Cimorelli* and *Roth*; but in *Del Vecchio* and in the instant matter, there was no immediate supervision of details as to the manner in which the work was to be done by the carrier. There were, therefore, different results reached in *Cimorelli* and *Del Vecchio;* but the *Bond* principles controlled the findings in both cases.

CONCLUSION.

The Petitioner seeks, through the medium of Petition for Writ of Certiorari, another opportunity to be heard on the merits of this case. He asks for a review of the evidence and inferences drawn therefrom; which is clearly not the purpose for which Certiorari was intended: *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175 (1937); *Magnum Import v. Coty*, 262 U. S. 159 (1922). The facts were undisputed and all inferences reasonably drawn therefrom did not constitute a sufficient basis for a possible finding that Petitioner was a Reading employee under the Act. The Third Circuit properly so found, and its decision should not be subject to further Appellate review.

Cooperation between contracting parties is a normal incident to a business relationship. It does not, however, change the relationship of the parties so as to make employees of an independent contractor, doing business as a freight forwarder, employees of a Railroad, so as give such employees rights under the Act which were never so intended. The Petitioner was never an employee of the Railroad, as adjudged by any standard tests of employer-

employee relationships. There is no conflict between decisions in the different Courts of Appeals, all of which have applied the same tests. Petitioner blandly charges Reading with an attempt to evade its responsibilities under the Act; but there is not one scintilla of evidence to support such charge. It is sheer hypocrisy to maintain that on the basis of the charge alone, the case should have been submitted to the jury. The evidence was legally insufficient and the Court so held.

There is no basis for the granting of the Petition for Certiorari in this case and the Writ should be denied.

Respectfully submitted,

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